2

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
E. T. Fitzgerald, P.J., D. E. Holbrook, Jr., and , G. R. McDonald, JJ.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

Supreme Court No. 118670

Court of Appeals No. 213402

-vs-

Lower Court No. 97-150129FH

CARMAN A. HARDIMAN
Defendant-Appellee
_____/

OAKLAND COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant

GAIL RODWAN (P28597)
Attorney for Defendant-Appellee

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

STATE APPELLATE DEFENDER OFFICE

BY: GAIL RODWAN (P28597)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, COURT RULES

TREATISES

STATEMENT OF QUESTIONS PRESENTED

I. HAS MICHIGAN ABANDONED THE NO INFERENCE ON INFERENCE RULE, AND DO THE DEFENSE AND PROSECUTION AGREE THAT *PEOPLE V ATLEY* SHOULD BE OVERRULED IN PART?

Court of Appeals made no answer.

Defendant-Appellee answers, "Yes".

II. DID THE COURT OF APPEALS CORRECTLY REVERSE MS. HARDIMAN'S CONVICTION WHERE THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE THAT SHE KNEW THE DRUGS WERE IN THE APARTMENT AND CONSTRUCTIVELY POSSESSED THE DRUGS WITH AN INTENT TO DELIVER?

Court of Appeals answers, "Yes".

Defendant-Appellee answers, "Yes".

COUNTER-STATEMENT OF FACTS

In May of 1998, Carman Hardiman was tried by a jury in Oakland County Circuit Court before Visiting Judge Robert W. Carr on charges of possession with intent to delivery a controlled substance, less than 50 grams, MCL 333.7401(2)(a)(iv), and possession of marijuana, MCL 333.7403 (2)(d). She was convicted of both counts and was sentenced to lifetime probation for count one and one year of probation for count two. She was ordered to pay $1,500.00 in court costs and attorney fees, $60.00 to the crime victims' rights fund, a $150.00 forensic fee and an $1,800.00 supervision fee payable at $30.00 per month. Her driver's license was suspended for six months.

The charges against Ms. Hardiman emanated from a raid on an apartment in the city of Pontiac on October 22, 1996. Small quantities of heroin and marijuana were found in the apartment. The prosecution maintained that Ms. Hardiman and Rodney Crump were residents of this apartment and that they jointly and constructively possessed the drugs that were found on the premises. Ms. Hardiman denied possession of the drugs.

The first witness at trial was Sergeant Robert Ford of the Pontiac Police Department. He testified that on October 22, 1996, he executed a search warrant at 278 Oakland Avenue, apartment number two, in the city of Pontiac. (49a) Sergeant Ford testified that he encountered one man outside of the apartment building and secured him in order to ensure the safety of the police team as it conducted the raid. (50a) Sergeant Ford also testified that as he approached the apartment building, he heard a lot of commotion that sounded like it came from more than one person. (68a) He did not know how many people were living in the particular apartment where the raid took place. (69a) He testified that the target apartment was "a single story, and it had approximately two

bedrooms with a kitchen area, a dining room, a living room area, as well as a bathroom." (51a). As he entered the apartment he observed three to five persons, "both male and female" who had been secured in the living room, including Ms. Hardiman. (51a-52a) Rodney Crump also had been secured, after having been "seized at the premises." (91a) On cross-examination, Sergeant Ford stated that he had no knowledge of where Carman Hardiman was when the police initially stopped her. (67a) Officer Peter Mistretta clarified that point when he testified that Ms. Hardiman was approaching the building at the time of the raid and was detained by police in the rear parking lot. (110a)

Sergeant Ford, who was qualified as an expert in drug trafficking, stated that he searched the dining room and "a bedroom in the northwest portion of the apartment." (53a, 58a, 59a) In a garbage can in the dining room, Sergeant Ford found eight plastic baggies with their corners torn away. (51a) In the northwest bedroom, he found a letter addressed to Carman Hardiman inside the drawer of a nightstand. He did not testify that he saw or seized anything from the nightstand other than that one letter. (59a-62a) Sergeant Ford testified that he and Officer Brian McLaughlin searched the bedroom at the same time. (61a) However, Officer McLaughlin, who was also a part of the raid team, testified that only he and an Officer Martinez searched that particular bedroom. (75a, 78a)

Officer McLaughlin testified that as he approached the apartment building from outside, he observed one man run into the basement, and several other people "running and scrambling in the hallway." (75a-76a) Officer McLaughlin stated the apartment was empty at the time the search began. "The apartment we were raiding in apartment two was empty. There was nobody inside the apartment when we executed the search

warrant." (76a) "Initially there were several people in the hallway and the person that I observed running was initially secured in the front yard of the building, right along Oakland Avenue. After everybody was secured, we began a search at the dwelling." (76a-77a).

During Officer McLaughlin's search of the northwest bedroom, he observed both men's and women's clothing inside a closet. He seized forty ten-dollar packs of heroin from the pocket of a blue jean dress that was hanging in that closet. (77a) When asked why the dress was not taken into evidence, Officer McLaughlin responded: "Items we actually find contraband in, we don't generally take." (88a) The officer did not know the size of the dress and made no attempt to determine whether the dress would fit Ms. Hardiman. (99a) When asked why the police did not attempt to obtain fingerprints from any of the evidence, he said: "We didn't need it." (90a) The officer listed the items that he personally seized from the bedroom:

> Inside a dresser inside a sock I found $400 in cash. In a TV stand I found correspondence for Rodney Crump and Ameritech calling card. And there was a nightstand along the side of the bed, right next to the bed. Inside that I found six more ten-dollar packs of heroin that were secured in a corner tie, a ten-dollar little bag of marijuana, a $130 in cash, an i.d. card and payment book for Rodney Crump also. (77a-78a)

Officer McLaughlin specifically testified that he did not find any correspondence addressed to Carman Hardiman in the bedroom. He did find one letter addressed to Ms. Hardiman in a mailbox located in the front yard of the apartment building. (78a-79a)

The prosecution introduced into evidence the forty packs of heroin found in the blue jean dress, the six packs of heroin and the marijuana found in the nightstand, all of which were discovered in the northwest bedroom by Officer McLaughlin and identified

by him as the same items he found during the raid. (80a-81a) The prosecution also introduced the letter found in the mailbox and addressed to Carman Hardiman, which Officer McLaughlin identified as the same letter he retrieved from the mailbox. (81a) A photograph of the dress in which the forty packs of heroin were found was introduced into evidence. (84a). The defense and the prosecution stipulated that the seized substances were tested by the Michigan Department of State Police Forensic Science Division and were in fact heroin and marijuana. (83a)

After Officer McLaughlin was qualified as an expert in drug trafficking, he testified that the letters addressed to Ms. Hardiman and Rodney Crump were seized as "evidence in our case to charge them, showing proof of residence that they lived at 278 Oakland Avenue, apartment two, and they have control over what's inside of the apartment building by living there." (85a) He offered the opinion that the heroin was intended for sale, but that the bag of marijuana was for personal use. (94a). Officer McLaughlin testified that he did not know how many people were living in apartment two at the time of the raid. (98a-99a) He did know that Rodney Crump had been tried and convicted as a result of the charges in this case. (100-101a)

The defense introduced a letter addressed to Rodney Crump from the Markel American Insurance Company, correspondence from Credit Acceptance Corporation addressed to Rodney Crump, an employee identification card from Avendale Convalescent Home for Rodney Crump and a payment book from Credit Acceptance Corporation for Rodney Crump. (96a) The prosecution offered to stipulate that these items were seized by Officer McLaughlin from the nightstand where the heroin and marijuana were discovered, and that an Ameritech calling card with Rodney Crump's

name on it was seized from a TV stand in the northwest bedroom. All of these items were admitted into evidence. (96a-97a).

At the close of the proofs, the defense moved for a directed verdict of not guilty. (114a-120a)

The jury returned verdicts of guilty on both of the charged counts. (154a-155a)

On July 1, 1998, the court sentenced Ms. Hardiman to lifetime probation for count one and one year probation for count two. (156a-157a)

Carman Hardiman appealed of right, and in an unpublished, per curiam opinion of February 6, 2001, the Court of Appeals vacated her conviction on the ground that there was insufficient evidence of her possession of the drugs. (2a-3a)

In an order of November 14, 2001, this Court granted the prosecution's application for leave to appeal and directed the parties to brief the issue of whether the inference on inference rule was violated in this case and whether *People v Atley,* 392 Mich 298 (1974), should be overruled. (1a) The prosecution filed its brief in this Court on or around January 29, 2002.

I. MICHIGAN HAS IN FACT ABANDONED THE NO INFERENCE ON INFERENCE RULE, AND THE DEFENSE AND PROSECUTION AGREE THAT *PEOPLE V ATLEY* SHOULD BE OVERRULED IN PART.

Standard of Review

The parties are in agreement that whether Michigan should follow the no inference on inference rule is a question of law to be reviewed *de novo*. *Cardinal Mooney High School v Michigan High School Athletic Association,* 437 Mich 75, 80 (1991); *People v Aguwa,* 245 Mich App 1, 3 (2001).

Argument

The origins of the no inference on inference rule are obscure. Most modern legal scholars, and many courts as well, have either repudiated the rule, denied that it ever existed or redefined it to mean something other than what the plain words seem to say: that an inference[1] cannot be based on another inference, but can only be based on an established fact.

Wigmore is perhaps the most outspoken in denying the very existence of the no inference on inference rule:

> It was once suggested that an inference upon an inference will not be permitted, i.e., that a fact desired to be used circumstantially must itself be established by testimonial evidence, and this suggestion has been repeated by several courts and sometimes actually has been enforced. . . . There is no such orthodox rule; nor can there be. If there were, hardly a single trial could be adequately prosecuted.

1A Wigmore, *Evidence* (Tillers rev 1983), § 41, pp 1106, 1111, footnotes omitted.

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[1] An inference is a permissible deduction from the evidence which a jury may accept, reject, or accord such probative value as it sees fit. It is "the result of a reasoning process by which a fact or proposition is deduced as a logical consequence from other facts that have already been proven." 29 Am Jur 2d, Evidence, § 181, p 202, n26.

Wigmore concludes that many of the cases that cite the rule may be "construed as merely prohibiting the drawing of speculative inferences rather than as prohibiting the drawing of an inference on the basis of another inference; it is often impossible to tell whether a court's condemnation of 'pyramiding' of inferences was meant to be taken literally or whether the court simply meant to condemn the type of pyramiding that produces speculative or unfounded inferences." *Id.*, p 1106, n2.

Our own Court of Appeals relied on this language from Wigmore when it said that what is *really* meant by the statement that an inference cannot be based on another inference "is that an inference cannot be based upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility." *People v Helcher,* 14 Mich App 386, 390 (1968).

While the exact meaning of the rule may be unclear, the purpose behind it is not: the rule is intended to assure that the standard of proof in a circumstantial case is not compromised. It is a way of "showing judicial mistrust for tenuous reasoning" in a circumstantial case. Anno: *Modern Status of the Rules Against Basing an Inference Upon an Inference or a Presumption Upon a Presumption,* 5 ALR 3d 100, § 2, p 106.

The rule was adopted by this Court in 1974 in *People v Atley,* 392 Mich 298 (1974). Just four years later in *People v Orsie,* 83 Mich App 42 (1978), *lv den* 408 Mich 857 (1980), the Court of Appeals claimed that it was "clarifying" the *Atley* rule. The dissent in *Orsie* stated that the majority opinion was not a clarification but, rather, a repudiation of *Atley.* This Court chose not to grant leave to appeal to resolve whether *Orsie* represented a clarification or a repudiation of the *Atley* decision.

In *Atley,* the prosecutor established that the defendant asked one Eaton to drive to another state with him and harvest marijuana and then return with the marijuana to Michigan. Eaton was to be paid after the marijuana was sold. The police arrested Atley and Eaton with the marijuana in their car. Atley was convicted of conspiracy to sell marijuana, but this Court reversed the conviction. Applying the no inference on inference rule, this Court said that from the fact that Atley and Eaton were arrested in the car with the marijuana one would have to infer that one or both of the men intended to sell it and then further infer that there was an agreement between them to sell the marijuana. This Court said that while inferences may be drawn from established facts, one inference may not be built on another. *Id.* at 315. The Court said that the no inference on inference rule is imbedded in Michigan law, is relied on in many cases and is recognized in "Michigan's leading criminal law and procedure hornbook. See 1 Gillespie, Michigan Criminal Law & Procedure (Supp 1974), § 388, p 220." *Id.* at 316, n2.

The Court specifically cautioned against reliance on language from *Dirring v United States,* 328 F2d 512, 515 (CA 1, 1964), *cert den* 377 US 1003; 84 S Ct 1939; 12 L Ed 2d 1052 (1964), *reh den* 379 US 874; 85 S Ct 27; 13 L Ed 2d 83 (1964), which includes the following:

> The rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends upon another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt.

Stating that it was exercising the caution *Atley* sounded regarding reliance on *Dirring v United States, Orsie* cited as "clear and instructive" the exact language from *Dirring* that *Atley* had cautioned *against* adopting. *Orsie* at 48. The *Orsie* majority

stated that it preferred to abandon the "no inference on inference" terminology because there is nothing inherently wrong with basing a valid inference on a valid inference. The majority acknowledged that the Supreme Court precedent of *Atley* was binding, but found its own opinion consistence with the substance of *Atley*. *Id.* at 48-49. The dissent said that, while stating otherwise, "the majority has simply abandoned the holding of *People v Atley, supra.*" *Id.* at 55.

Since 1978, most courts in this state have followed *Orsie*, not *Atley*. This is true of the Court of Appeals [see, for example, *People v Boose,* 109 Mich App 455, 471 (1981), and *People v Sutherlin,* 116 Mich App 494, 501 (1982)], but it is equally true of this Court as well. One of the most interesting observations regarding the rule was made by Justice Boyle in her 1993 opinion in *People v VanderVliet,* 444 Mich 52, 61 (1993) [quoting Imwinkelreid, *Uncharged Misconduct Evidence,* §2:17, pp 45-46], where she stated:

> At one time, several American jurisdictions adhered to the view that an inference cannot be based upon another inference. That view made it difficult to introduce evidence which relied on immediate inferences for its relevance. Modernly, the courts have discredited the "no inference on inference" rule.

Nowhere in the *VanderVliet* opinion did Justice Boyle acknowledge that Michigan is one of those jurisdictions that still follows what she described as the now-"discredited" no inference on inference rule.

Similarly, the 1999 revised version of Gillespie's *Michigan Criminal Law & Procedure* (2nd ed), § 18:5, pp 255-256, cited *Orsie,* and pointedly ignored *Atley,* in stating that what the rule means is that an inference "cannot be based upon evidence which is uncertain or speculative," but that if "each inference is independently supported

by established facts, any number of inferences may be combined to decide the ultimate question. Reasonable inferences may be drawn from circumstantial evidence and established facts." This certainly is a very different position than the one this Court pointed to in *Atley* when the Court cited the 1974 edition of Gillespie as authority for the proposition that the no inference on inference rule is "strongly imbedded in Michigan law." *People v Atley, supra,* at 316, n2.

Most recently in *People v Nowack,* 462 Mich 392, 400 (2000), this Court cited *People v Carines,* 460 Mich 750, 757 (1999), for the proposition that "circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." The Court did not mention the *Atley* prohibition.

The fact is that most Michigan cases dealing with the sufficiency of circumstantial evidence pay absolutely no attention to the no inference on inference rule. In an entirely straightforward and logical manner the cases apply the *Jackson v Virginia,* 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979), *People v Hampton,* 407 Mich 354 (1979), test to determine whether the proofs have established every element of the crime beyond a reasonable doubt.

That is what this Court did recently in *People v Johnson,* 460 Mich 720 (1999), and *People v Goecke,* 457 Mich 442 (1998), and what the Court of Appeals did in *People v Nunez,* 242 Mich App 610 (2000); *People v Brown,* 239 Mich App 735 (2000); and *People v Nimeth,* 236 Mich App 616 (1998). It is what the Court of Appeals did in Carman Hardiman's case as well, where the opinion never mentions *Atley* or the no inference on inference rule.

The law says that while a prosecutor need not specifically negate every reasonable theory consistent with innocence, he or she must present proof beyond a reasonable doubt, whether direct or circumstantial, on each element of the charged offense. *People v Konrad,* 449 Mich 263, 273 n6 (1995); *People v Wolford,* 189 Mich App 478, 480 (1991). To the extent *Atley* suggests that an inference can never be based on another inference, regardless of reliability, this Court should now overrule *Atley.*

The defense and prosecution are in agreement on the most important point here, which is that *Atley* is now an anomaly, not only nationally, but in Michigan as well. However, the prosecution's brief to this Court makes two lesser points with which the defense cannot agree. The first point is that the *Atley* rule was not violated in this particular case, and the second, quite inconsistent, point is that there *is* no *Atley* rule because the discussion of the inference on inference rule in the *Atley* opinion is mere *dicta.*

The prosecutor's brief cites *People v McWilson,* 104 Mich App 550, 555 (1980), *lv den* 412 Mich 865 (1981), for the proposition that "if each inference is independently supported by established fact, any number of inferences may be combined to decide the ultimate question." The prosecutor then cites facts from this case supporting the inference that the northwest bedroom of the apartment where Ms. Hardiman was alleged to live with Mr. Crump was occupied. The defense agrees that the facts support an inference of occupancy. From other facts, the prosecutor infers that Ms. Hardiman shared that particular bedroom with Mr. Crump, and from still other facts the prosecutor infers that Ms. Hardiman knew the heroin and marijuana were in the apartment. (See prosecution's brief at pages 14-15.) The second and third inferences are weaker than the

first, but even if one concluded that all three inferences were reasonable, a pyramiding of inferences would still be required before one could reach a conclusion of guilt. Joint occupancy and knowledge do not make Carman Hardiman guilty of this crime. From the inference of knowledge, one would be required to draw the further crucial inference of right of control of the drugs and then an additional inference of actual intent to deliver the heroin. Contrary to what the prosecution seems to suggest in its brief at page 15, nonexclusive possession of an apartment cannot be equated with one occupant's control of everything inside that apartment. Specific evidentiary factors beyond joint occupancy and knowledge must create a "link" between the accused and the contraband.

People v Atley adopted a rule of law, and the rule of law was violated in this case. The rule cannot be explained away by labeling it "mere dicta" where it was not "mere dicta." In *Atley,* this Court articulated two closely related but separate grounds for vacating the conviction for conspiracy to sell marijuana. The first ground was that an agreement to sell was unfairly inferred from the evidence presented. The second ground was an impermissible piling of inference on inference (an inference of an intent to sell did not support the further inference of an agreement to sell). *Id.*at 316-317. When an appellate court overturns a conviction on more than one ground, the law does not say that any ground beyond the first one cited is *dictum.* The cases cited by the prosecution on page 18 of its brief certainly do no support any such proposition. This Court itself acknowledged that *Atley* announced a rule when it directed the parties to brief the issue of whether the rule was violated under the facts of this case and whether the *Atley* decision should be overruled. (1a)

II. THE COURT OF APPEALS CORRECTLY REVERSED MS. HARDIMAN'S CONVICTION WHERE THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE THAT SHE KNEW THE DRUGS WERE IN THE APARTMENT AND CONSTRUCTIVELY POSSESSED THE DRUGS WITH AN INTENT TO DELIVER.

Standard of Review

Claims of insufficient evidence are reviewed *de novo. United States v Canan,* 48 F 2d 954, 962 (CA 6, 1995). The issue is constitutional in nature. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). Carman Hardiman was denied due process under the United States Constitution and the Michigan Constitution when she was convicted on the basis of legally insufficient evidence. US Const, Am XIV; Const 1963, art 1, § 17.

Although a claim of insufficient evidence need not be raised at trial in order to preserve it for appellate review, *People v Patterson,* 428 Mich 502, 514 (1987), the issue was preserved here when the defense moved for a directed verdict.

Argument

In its opinion in this case, the Court of Appeals did not engage in an analysis of the possible inferences that might be drawn from the facts, but it did conclude that the proofs failed to establish that Ms. Hardiman knew of and constructively possessed the narcotics that police found in her apartment at a time when she was not there.

A collection of cases from around the nation dealing with the issue of when there is sufficient evidence to convict a defendant of possessing drugs when the drugs are found in a place shared by the defendant and others can be found in Anno: *Conviction of Possession of Illicit Drugs Found In Premises of Which Defendant Was in Nonexclusive Possession,* 56 ALR 3d 948, §§ 1, 2, 5-10, 13. The annotation notes that an accused's possession of the drugs need not be exclusive, and possession may be established by circumstantial evidence and reasonable inferences drawn from that evidence. See 56 ALR 3d 948, § 2, p 953, n6, n7, citing *Petty v People,* 167 Colo 240, 245; 447 P2d 217 (1968). See also *People v Nunez,* 242 Mich App 610, 616 (2000). Conversely, when possession of the premises where drugs are found is not exclusive, one cannot infer that the defendant knew of and had control of the drugs without specific evidentiary factors supporting that inference. Even if the defendant is present on the premises when the drugs are found, that does not prove constructive possession. Some additional link between the defendant and the contraband must be shown. *People v Fetterley,* 229 Mich App 511, 515 (1998). The prosecution agrees that a person constructively possesses a controlled substance only where she knows of its presence *and* has the right to exercise control over it *or* is in proximity to the substance together with indicia of control over it. See prosecutor's brief at page 9 citing *People v Wolfe,* 440 Mich 508, 520 (1992); *People v Hill,* 433 Mich 464, 470 (1989); *People v Sammons,* 191 Mich App 351, 371 (1991), *lv den* 439 Mich 938 (1992).

Classic evidentiary factors include whether the defendant made any incriminating statements or engaged in any incriminating behavior around the time the drugs were discovered; whether the defendant is a drug user or seller; whether the defendant was in

close proximity to the place where the drugs were found; and whether the drugs were found among the defendant's personal belongings.

A. MS. HARDIMAN MADE NO INCRIMINATING STATEMENTS.

One evidentiary factor supporting an inference of constructive possession is an incriminating statement by the defendant. In *People v Fetterly, supra* at 517, for example, the defendant admitted to the police that he was part of a drug-trafficking organization. In *Puerte v State,* 888 SW 2d 521, 524, 526 (Texas App San Antonio, 1994), after the police found a powdery substance in the defendant's kitchen, the defendant volunteered, "I don't live in this apartment. What you found is aspirin, crushed aspirin." In contrast, Carman Hardiman said nothing of an incriminating nature when she returned home to discover that the police were conducting a raid of an apartment she shared with Rodney Crump, if not with others as well.

B. MS. HARDIMAN ENGAGED IN NO INCRIMINATING BEHAVIOR.

Incriminating behavior may support an inference of constructive possession. In *Francis v State,* 410 So 2d 469, 471 (Ala App 1982), for example, when a police officer knocked on the defendant's door with a warrant, the defendant slammed the door in his face, and ran back into the house saying, "Throw it in the fire, throw it in the fire." In *Gamon v State*, 772 So 2d 43, 45, 46 (Fla Dist Ct App, 4th Dist, 2000), the defendant told his girlfriend to show the police "where everything is." In contrast, Ms. Hardiman engaged in no incriminating behavior after a police officer stopped her in the apartment parking lot and told her she could not go into her apartment because the police had just raided it.

C. MS. HARDIMAN WAS NOT A USER OR A SELLER OF CONTROLLED SUBSTANCES.

Evidence that the defendant has used or sold drugs in the past may forge the necessary evidentiary link between the defendant and the contraband. In *People v Fusaro,* 18 Cal App 3d 877, 891; 97 Cal Rptr 368 (1971), for example, the defendant had made prior sales from the same location. In *State v Norwood,* 721 SW 2d 175, 178 (Mo App 1986), the defendant had possessed marijuana at the same residence previously and had said he would sell it if he personally knew the customer. In contrast, there is nothing in the trial record to suggest that Carman Hardiman ever used or sold drugs.

D. MS. HARDIMAN WAS NOT IN OR NEAR THE APARTMENT WHEN THE POLICE DISCOVERED DRUGS THERE.

Another factor is whether the defendant was in the place where the drugs were found at the time they were found and under circumstances suggesting the defendant's control. An example is *Brown v State,* 428 So 2d 250, 251 (Fla 1983), where contraband was scattered throughout the house, much of it in plain view, and the defendant was present when police conducted the search. Another is *Moye v State,* 139 Md App 538, 547; 776 A 2d 120 (2001), *cert granted* 366 Md 274; 783 A2d 653 (2001), where the defendant was in his residence and the drugs in plain view at the time of the raid. In *People v Griffith,* 235 Mich App 27, 35 (1999), evidence established that the defendant had substantial control over a drug house whose owner said that cocaine found on top on of a dresser in plain view belonged to the defendant, and the defendant agreed that he had just spent the night in the room where the cocaine was found. There was testimony from the police at Ms. Hardiman's trial that no one was inside the apartment when the police

entered it, but one man was seen running into the basement and several other people were "running and scrambling in the hallway." (T I 125). Ms. Hardiman was not present in building and only later drove into the apartment parking lot.

E. DRUGS WERE FOUND IN THE POCKET OF A DRESS NOT IDENTIFIED AS BELONGING TO MS. HARDIMAN; DRUGS WERE FOUND IN A NIGHTSTAND ALONG WITH DOCUMENTS WITH RODNEY CRUMP'S NAME ON THEM.

When drugs are found together with other items clearly belonging to the defendant, another link is forged. Examples of cases where courts have found a sufficient nexus between the accused and the drugs to support a conviction for drug possession include the following: *People v Hamilton,* 223 Cal App 2d 542, 545; 35 Cal Rptr 812 (1963), where marijuana cigarettes were found in a drawer containing the defendant's personal effects; *People v Lemble,* 103 Mich App 220, 223 (1981), where drugs were found in a box with the defendant's personal papers in an apartment where the defendant lived with a girlfriend, and the defendant told the police that the girlfriend had nothing to do with "that stuff"; *United States v Gibbs,* 182 F 3d 408, 425 (CA 6, 1999), where drugs were found inside a handbag in a bedroom of premises of which the defendant had nonexclusive possession, and a government agent testified that he saw the defendant carrying an identical handbag; *United States v Noibi,* 780 F 2d 1419, 1421-1422 (CA 8, 1986), where drugs were found inside a dresser that the defendant shared with his wife, and the defendant's prints were found on the drug packaging; *People v Hellenthal,* 186 Mich App 484, 487 (1990), where the defendant shared a house with his girlfriend, and drug paraphernalia and marijuana residue were found in the headboard of his bed,

cocaine was found in the bedroom closet, and marijuana was found in a letter holder containing bills addressed to the defendant alone.

In contrast, cases where courts have found an *insufficient* nexus between the accused and the drugs include the following: *People v Monson,* 255 Cal App 2d 689, 692-693; 63 Cal Rptr 409 (1967), where marijuana was found in a bedroom closet containing men's and women's clothing, and the female defendant lived in the apartment with a man and his son; *Petty v People, supra,* where marijuana was found in a bedroom shared by the defendant and a roommate; *Commonwealth v Hicks,* 243 Pa Super 171, 176-177; 364 A 2d 505 (1976), where the defendant was not present when the home was searched, there was no evidence as to when the defendant was last in the home or as to which rooms he inhabited, and two other people were known to have access to the home; *Pier v State,* 400 NE 2d 209, 210-212 (Ind App 1980), where defendant resided in the apartment where marijuana was found, where some of the defendant's possessions were in a closet of a bedroom where the marijuana was found, but where the defendant was not present, and others had equal access to the apartment at the time; *Nations v State,* 177 Ga App 801, 802; 341 SE 2d 482 (1986), where cocaine was found in an occupied bedroom of a three bedroom home, and other people living in the home had equal access to the bedroom; *State v Garza,* 112 Idaho 778, 784; 735 P 2d 1089 (1987), where a husband and wife shared the house where contraband was found in three locations including the master bedroom, where the prosecutor established that the husband and wife had joint possessory interest in the home, that both had full access to the areas where the contraband was concealed and both had knowledge of the contraband, but where the

prosecutor failed to present sufficient evidence that the defendant exercised any control or right of control over the drugs.

In the present case, drugs were found in the pocket of a dress hanging inside a closet containing men's and women's clothing. Although it was the prosecutor's theory that Carman Hardiman shared the apartment with Rodney Crump, it is simply unknown how many people had access to that apartment. The police did not seize the dress and made no attempt to determine to whom the dress belonged.

Exactly what was found inside a nightstand in the bedroom is a matter of some importance in this case. Although the prosecutor has argued that no one testified that there was more than one nightstand in the northwest bedroom, it is also true that no one testified that there was *not* more than one nightstand. Sergeant Robert Ford testified that he and Officer Brian McLaughlin searched the northwest bedroom together and that he found one letter addressed to Carman Hardiman inside one of the drawers of the nightstand. (50a-60a) However, Officer McLaughlin testified that *only he and an Officer Martinez* searched the northwest bedroom. (75a, 78a) Officer McLaughlin listed the items that he personally seized from a nightstand next to the bed: six ten-dollar packs of heroin secured with corner ties, a ten-dollar bag of marijuana, $130 in cash, and an identification card and a payment book in the name Rodney Crump. The parties later stipulated to several other documents found in the bedroom, all with the name Rodney Crump on them. Officer McLaughlin testified that he did not find correspondence anywhere in the bedroom addressed to Carman Hardiman. (78a) Although it was the job of the jury to resolve the factual inconsistencies in the testimony of Officers Ford and McLaughlin, there is no way to read the testimony of the officers to mean that heroin

and/or marijuana were found together in the same drawer with a letter addressed to Carman Hardiman.

The prosecution's brief suggests two links between the contraband and Ms. Hardiman, but neither separately nor together are they strong enough to establish constructive possession. The first link is that Ms. Hardiman shared the bedroom where the drugs were found. The prosecution at trial introduced only one letter with her name on it to support its contention that the northwest bedroom was Ms. Hardiman's, in an apartment which at least one police officer characterized as appearing to have two bedrooms. Even accepting as true that she used that bedroom, shared occupancy of a room where drugs were found at a time when Ms. Hardiman was not present in the home is an insufficient link to establish her constructive possession of the drugs. (See cases cited above in this section of the brief.) The same is true of the prosecutor's proposed second link: that drugs were found in the nightstand and in a dress pocket in the closet, and empty baggies were found in a garbage can in the dining room. Such links might well provide legally sufficient evidence to convict Rodney Crump, especially since several pieces of identification with his name on them were found together with the drugs in the nightstand, and he was one of the people rounded up by the police either inside or just outside the apartment building just before the raid took place. But these links do not forge a connection between Carman Hardiman and the drugs because Ms. Hardiman was not in or near the apartment unit at the time of the raid, the record does not reflect when she had last been inside the apartment, and another or others had access to the apartment in the interim.

The prosecution has argued to this Court that the Court of Appeals failed to review the evidence in the light most favorable to the prosecution when it reviewed the evidence against Ms. Hardiman (prosecution brief at page 7), but there is nothing in the Court of Appeals opinion to support that contention. The Court of Appeals specifically *stated* that it was viewing the evidence in the light most favorable to the prosecution in determining whether a rational trier of fact could find the essential elements proven beyond a reasonable doubt, and that it recognized that circumstantial evidence and reasonable inferences arising from that evidence can constitute proof of the elements of a crime. The Court of Appeals concluded that while the prosecution presented sufficient evidence to link Ms. Hardiman to the apartment, it failed to connect her to the drugs themselves. Finding that "the prosecution failed to establish the requisite nexus between defendant and the contraband beyond a reasonable doubt," the Court was compelled to reverse the convictions. (3a) The Court of Appeals engaged in exactly the correct analysis under the law and facts of the case. It will remain the correct analysis regardless of whether this Court repudiates or reaffirms *People v Atley* and the no inference on inference rule.

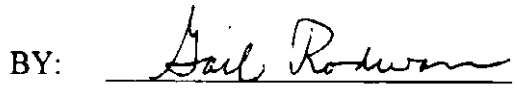
Defendant Hardiman asks this Court to affirm the decision of the Court of Appeals.

SUMMARY AND RELIEF

Defendant-Appellee Carman Hardiman asks this Court to uphold the decision of the Court of Appeals and vacate her convictions.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 

GAIL RODWAN (28597)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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